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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SANTOS MARTINEZ, Defendant and Appellant.	G042402 (Super. Ct. No. SWF015231) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Judith C. Clark, Judge. Affirmed.

Jerry D. Whatley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Garrett Beaumont and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was convicted of murder and other crimes stemming from his participation in an attack against a group of people he had recently encountered at a bar. He contends there is insufficient evidence to support the jury's finding the attack was premeditated, and the trial court committed a host of instructional errors. In addition, he argues the court unduly restricted his right of cross-examination and erroneously denied his motion for a new trial. The Attorney General also raises an issue pertaining to the legality of appellant's prison sentence. We find the parties' claims unmeritorious and affirm the judgment in its entirety.

FACTS

One night around 10 o'clock, appellant drove to the Lake Inn tavern in Nuevo. He entered the bar with two younger men, and while they were inside they drank and socialized. Victor Ontiveros and four of his friends — Angel Valencia, Manuel Cadena and Samuel and Antonio Barajas — were also at the bar. Although there was some tension between Victor's group and appellant's group, nothing came of it inside the bar.

However, as the two groups were leaving the bar, Angel urinated near appellant's car, sparking a confrontation. The two groups exchanged heated words, and after several minutes of arguing, the two young men with appellant drew knives. Appellant tried to calm everyone down and convinced the two young men to get into his car. He then drove away with them.

Victor's group waited about 10 minutes before leaving in Victor's car. About a mile from the bar, they noticed appellant's car following them. With his headlights turned off, appellant bumped his car into the rear of Victor's vehicle. Then he struck the rear driver's side of the vehicle. The impact of the second collision caused both cars to lose control and go off the road.

When the cars stopped, Victor exited his car, as did Antonio and Manuel. Appellant and the two younger men approached them. Appellant began fighting with

Manuel, and one of the younger men chased down Victor and stabbed him twice in the back. The two younger men then ordered Angel and Samuel out of their car. One of the men stabbed Angel in the abdomen, perforating his bowel, and the other repeatedly stabbed Samuel in the chest and back. Just before blacking out, Samuel heard the knifemen describe him and Angel as being as good as dead.

At this point in the attack, Manuel and appellant were still fighting. But when Manuel heard Angel screaming, he ran to his aid. Appellant and Antonio then began to grapple. As appellant held him, one of the younger men stabbed Antonio in the arm. Antonio then pulled away from appellant and ran over to where Angel and Manuel were hiding near the cars.

Appellant tried to escape in the vehicles, but they were both disabled, so he fled on foot. His two companions also ran away, and they were never identified. Later that night, appellant called his wife for a ride home and asked her to report that his car had been stolen. When they got home, appellant showered, changed clothes and told his wife about the fight. He had a large bump on his head and numerous abrasions on his arms and legs. At his wife's urging, he returned to the scene and surrendered to the police. Two days later, Angel died from his wounds.

In both his statements to the police and at trial, appellant denied any wrongdoing. He claimed he arrived at the bar alone and did not know the two men who ended up in his car. He also asserted Victor caused the cars to crash. He said he blacked out after the accident and doesn't remember much about the subsequent altercation, except that he may have been knocked unconscious at some point during the fight.

Relying on conspiracy and aiding and abetting principles, the prosecution charged appellant with murdering Angel (second degree), attempting to murder Victor and Samuel with premeditation, and assaulting Antonio with a deadly weapon. Appellant was also charged with five counts of assault with a deadly weapon, based on his own

actions in driving his car into Victor's vehicle. The jury convicted appellant on all counts, and the trial court sentenced him to seven years in prison.

I

Appellant claims there is insufficient evidence to support the jury's finding the attempted murders were carried out with premeditation. We disagree.

In reviewing the sufficiency of the evidence to support a criminal conviction, we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence from which a jury could find the defendant guilty beyond a reasonable doubt. (*People v. Story* (2009) 45 Cal.4th 1282, 1296.) We do not reweigh the evidence or revisit credibility issues, but rather presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Unless it is clearly shown that 'on no hypothesis whatever is there sufficient substantial evidence to support the verdict' the conviction will not be reversed. [Citation.]" (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.)

In *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, the California Supreme Court identified three categories of evidence that may support a finding of premeditation: planning activity, motive, and manner of killing. These categories are descriptive, not normative or exhaustive, and are intended "to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. [Citation.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1125; see also *People v. Bolin* (1998) 18 Cal.4th 297, 331.) We must remember "premeditation can occur in a brief period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (*People v. Perez, supra,* 2 Cal.4th at p. 1127.)

Here, all three categories of evidence identified in *Anderson* as being indicative of premeditation were present. As to whether the attack on the victims was planned, the record indicates appellant followed Victor's car after the initial confrontation in the parking lot. Although Victor waited about 10 minutes after appellant left the lot before driving away himself, appellant tracked him down on the roadway about a mile from the bar. Appellant then proceeded to ram his car into Victor's vehicle. When the initial bumper-to-bumper contact did not succeed in slowing Victor's car, appellant resorted to a more forceful tactic by slamming into the side of his car. Then, once Victor's car was disabled, appellant and his companions wasted little time confronting and inflicting serious harm on the victims. Considering the lengths appellant and his companions went through just to get at the victims, it appears their actions were the result of preexisting reflection as opposed to unconsidered impulse.

As for motive, it is undisputed appellant's group argued with Victor's group for several minutes after appellant discovered Angel urinating by his car. During this time, the friction between the groups became so intense that appellant's companions pulled out knives. Appellant was able to dissuade them from doing anything rash at that point, but, as explained above, the incident so annoyed appellant's group that they followed Victor's group from the bar and even risked harm to themselves by forcing Victor's car off of the road. Suffice it to say, there was sufficient evidence of enmity between the two groups for the jury to infer a motive for the charged offenses.

The manner in which appellant's group perpetrated the attack was also indicative of premeditation. Victor was stabbed twice in the back and Samuel was stabbed twice in the chest and eight times in the back. Although appellant describes the attack as "clumsy and ineffectual," that's not how the assailants saw things. When the attack was over, they described the victims as being as good as dead, which reflects a certain degree of satisfaction about the carnage they had inflicted. Considering all the

circumstances, there is sufficient evidence upon which the jury could find the stabbings were carried out with premeditation.

II

Appellant contends the court's instructions on aiding and abetting were faulty because they permitted the jury to consider the assault he committed with his car as the target offense for the prosecution's natural and probable consequences theory. Appellant's contention is based on the premise that a defendant can only be liable under the natural probable consequences doctrine if he aids and abets *another person* in committing the target offense. Since appellant personally committed the car assault, he contends the doctrine cannot be applied to that particular offense. Appellant is incorrect.

In instructing on aiding and abetting, the court told the jury it could find appellant guilty of murder and attempted murder if those crimes were a natural and probable consequence of assault. Appellant concedes the instruction was proper to the extent it applied to the assaults he aided and abetted following the collision. However, because the court did not so specify, and because the prosecutor argued the natural and probable consequences doctrine applied to the assault he committed with his car, appellant contends the instruction was improper. Indeed, he contends the court should have specifically instructed the jury that the target offense could *not* be the assault he committed by smashing into Victor's vehicle.

"The flaw in [appellant's] reasoning is that a perpetrator of an assault and an aider and abettor are *equally* liable for the natural and foreseeable consequences of their crime. Both the perpetrator and the aider and abettor are principals, and *all* principals are liable for the natural and reasonably foreseeable consequences of their crimes. . . ." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376.) Were that not the law, a person who merely aids and abets a target offense could be subject to greater liability than the person who actually commits it. For example, the passengers in

appellant's car could be held liable for the natural and probable consequences of appellant's actions in ramming into Victor's car, but not appellant himself.

"Fortunately, that is not the law. [Appellant] was a principal in the assault [with his vehicle] and therefore responsible for the natural and probable consequences of that assault." (*People v. Olguin, supra,* 31 Cal.App.4th at p. 1376; accord, *People v. Culuko* (2000) 78 Cal.App.4th 307, 329-330.) Therefore, the trial court did not err in failing to instruct otherwise.

III

Continuing his attack on the jury's instructions, appellant contends the instructions on vicarious liability were flawed for a variety of other reasons. While the instructions were not perfect, they sufficiently apprised the jury of the legal principles applicable to the case. Therefore, they do not warrant a reversal.

In reviewing the challenged instructions, we must keep in mind that jury instructions "'should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1112.) We "'"assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]"'" (*Id.* at p. 1111.) And unless there is a reasonable likelihood the jury misunderstood the challenged instruction, we must uphold the court's charge to the jury. (*People v. Cain* (1995) 10 Cal.4th 1, 36; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191.)

Pursuant to CALCRIM No. 403, the court told the jury, "Before you may decide whether the defendant is guilty of murder . . . or attempted murder . . . you must decide whether he is guilty of assault. [¶] To prove that the defendant is guilty of assault, the People must prove that: [¶] 1. The defendant is guilty of assault; [¶] 2. During the commission of assault, a coparticipant in that assault committed the crime of murder or attempted murder; and [¶] 3. Under all of the circumstances, a reasonable person in the

defendant's position would have known that . . . murder or attempted murder was a natural and probable consequence of the . . . assault.

"A coparticipant in a crime is the . . . perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or an innocent bystander. [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder or attempted murder was committed for a reason independent of the common plan to commit the assault, then the . . . murder or attempted murder was not a natural and probable consequence of assault."

As appellant correctly notes, the second sentence of this instruction should have referred to the charged crimes, not the target crime. In other words, it should have told the jury that "to prove the defendant is guilty of *murder and attempted murder*, the People must prove that he is guilty of assault . . . ." However, the remainder of the instruction makes that point pellucidly clear. In fact, it plainly states that appellant could not be convicted of murder or attempted murder unless those crimes were a natural and probable consequence of the target offense of assault. The parties' closing arguments also made this point clear. Viewing the record as a whole, it is not reasonably likely the jury construed the instruction in a fashion that undermined appellant's rights.

Still, appellant argues, "It is unclear to which assault [the instruction] refers. Some jurors may have concluded that it referred to the assault with the car, while other jurors could have concluded that it referred to the assault committed after the two cars came to rest." The short answer is, it doesn't matter. Contrary to appellant's belief, and as explained in section II above, his actions in assaulting the victims with his car provided a sufficient factual basis for the court's instruction, even though he personally perpetrated that offense. And so did his actions in perpetrating and aiding and abetting the assaults that occurred following the crash. Therefore, it is immaterial that the court

failed to specify which particular assault constituted the target offense. (*People v. Hickles* (1997) 56 Cal.App.4th 1183, 1194 [jurors need not unanimously agree on which target crime the defendant aided and abetted].)

Appellant also takes issue with the court's instructions on conspiracy. As it did in instructing on aiding and abetting, the court confused the charged crimes and the target crime at one point in instructing on the natural and probable consequences doctrine. It stated, "To prove that the defendant is guilty of [murder and attempted murder], the People must prove that: [¶] 1. The defendant conspired to commit . . . assault with a deadly weapon, to wit, a car; [¶] 2. A member of the conspiracy committed assault with a deadly weapon, to wit, a car, to further the conspiracy; and [¶] 3. Murder or . . . attempted murder . . . were the natural and probable consequences of the common plan or design of the crime that the defendant conspired to commit. [¶] The defendant is not responsible for the acts of another person who was not a member of the conspiracy even if the acts of the other person helped . . . accomplish the goal of the conspiracy. [¶] A conspiracy member is not responsible for the acts of other conspiracy members that are done after the goal of the conspiracy has been accomplished."

Appellant is correct that the second requirement listed in the instruction should have referred to *murder and attempted murder* as the offenses that were allegedly committed in furtherance of the conspiracy. However, again, it is our belief the instructions as a whole reasonably conveyed this principle to the jury. The instructions clearly stated defendant's liability for murder or attempted murder could only attach if those crimes "were the natural and probable consequences of the common plan or design of the crime that the defendant conspired to commit." They also clearly identified assault with a deadly weapon as the crime the defendant conspired to commit. Therefore, we do not believe they were materially misleading. Given everything the jury was told in regard to the prosecution's theories of vicarious liability, and given the arguments of counsel, it would have known that assault was the predicate offense for those theories,

and the charged crimes of murder and attempted murder were the alleged natural and probable consequences of the assault. Therefore, the few instructional errors that did occur are not grounds for reversal.

IV

Appellant argues the court erred in instructing the jury it could infer guilt based on any false statements he may have made. He contends the instruction lacked a sufficient factual basis and constituted an impermissible pinpoint instruction, but neither claim is well taken.

Pursuant to CALCRIM No. 362, the court instructed the jury, "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Appellant claims this was an improper pinpoint instruction because it singled out his statements for special scrutiny. However, because the instruction is couched in permissive terms (i.e., the jury "may" consider the defendant's lying as evidencing consciousness of guilt), the jury was free to draw its own conclusions from appellant's statements. Moreover, the instruction "does not merely pinpoint evidence the jury may consider. It tells the jury it may consider the evidence *but it is not sufficient by itself to prove guilt*. [Citation.] [] If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly* (1992) 1 Cal.4th 495, 531-532.) Because it limits the manner in which the jury may consider the defendant's false statements, the instruction is fairly balanced and does not offend due

process principles. (*People v. Howard* (2008) 42 Cal.4th 1000, 1025; *People v. Kelly, supra,*
1 Cal.4th at pp. 531-532; *People v. Kipp* (1998) 18 Cal.4th 349, 375; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1224; *People v. McGowan* (2008) 160 Cal.App.4th 1099, 1103-1104 [minor differences between CALCRIM No. 362 and its predecessor CALJIC No. 2.03 are insufficient to undermine Supreme Court's approval of the language of the instructions].)

Regarding the factual predicate for the instruction, the record shows that following the incident, appellant asked his wife to report that his car had been stolen. Whether appellant's car had actually been stolen or whether his wife relayed this information to the police is immaterial because the statement reflects appellant's intent to mislead authorities into believing he was not near the vehicle at the time of the accident or when the subsequent attack took place. Accordingly, the statement provided a sufficient factual basis for CALCRIM No. 362.

V

Appellant also submits there was not an adequate factual foundation for the court to give CALCRIM No. 372, which told the jury, "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself." We find there was ample evidence to support the instruction.

"In general, a flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.'" (*People v. Avila* (2009) 46 Cal.4th 680, 710.) "Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest 'a purpose to avoid being observed or arrested.'

[Citations.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.) However, "[t]o obtain the instruction, the prosecution need not prove the defendant . . . departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence. [Citation.]" (*Ibid.*) In other words, "[a]lternative explanations for flight conduct go to the weight of the evidence, which is a matter for the jury, not the court, to decide. [Citations.]" (*People v. Rhodes* (1989) 209 Cal.App.3d 1471, 1477.)

After the stabbings in this case occurred, appellant tried to leave the scene in his own car and then tried to do so in the victims' car. Finding neither car operable, he made his escape on foot while the victims were crying out in pain. He then called his wife and had her take him home, where he showered and changed clothes. It was only after discussing the events with his wife — and at her insistence — that he finally returned to the scene of the crime and turned himself in to the police. As these circumstances clearly suggest appellant fled the scene to avoid being seen or arrested, there was a sufficient factual basis for the flight instruction.

Appellant also contends CALCRIM No. 372 is unconstitutional because it lessens the prosecutor's burden of proof, creates an improper inference of guilt, and encourages the jury to infer guilt of the greater rather than lesser charged crimes. These contentions have been addressed by other courts and found to be without merit. (*People v. Avila, supra,* 46 Cal.4th at p. 710; *People v. Navarette* (2003) 30 Cal.4th 458, 502; *People v. Mendoza* (2000) 24 Cal.4th 130, 179-181; *People v. Paysinger* (2009) 174 Cal.App.4th 26, 31-32; *People v. Hernandez Ríos* (2007) 151 Cal.App.4th 1154, 1158-1159.) For the reasons explained in these decisions, we reject appellant's claim the giving of CALCRIM No. 372 violated his right to due process or a fair trial.

VI

At the preliminary hearing, some of the victims made statements indicating they were illegal immigrants. However, at trial, the court granted the

prosecution's motion to preclude the defense from cross-examining the victims about their immigration status. Appellant contends this was error, but we find no basis to disturb the court's ruling.

Under Evidence Code section 352, a trial court "may and should" exclude evidence that involves "undue time, confusion, or prejudice which outweighs its probative value." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296-297, fn. omitted.) The statute is designed to "prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*Id*. at p. 296.) To that end, the trial court has broad discretion to exclude impeachment evidence and its decision to do so will only be disturbed "on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Invoking Evidence Code section 352, the trial court determined the probative value of trying to establish the victims' immigration status was not worth the effort it would entail. Believing the issue was only marginally relevant to the witnesses' credibility, the court felt its exploration would warrant an undue consumption of time and possibly confuse the issues. These concerns are well taken. There is no question the victims' veracity was an important issue in the case. However, permitting questioning about their immigration status may have caused some of the jurors to disbelieve them simply because of their status as "illegals." In other words, the label itself could have caused the jury to resent or mistrust them, as opposed to anything they actually did in terms of coming to this country. In this regard, we must keep in mind there are a variety of ways an undocumented person can enter the United States, including being brought here as a child.

Notwithstanding the evidence at the preliminary hearing, proving the victims were actually illegal immigrants could also have necessitated a great deal of time and energy, which would have bogged down the case considerably. Indeed, the last thing

this trial needed was a parade of witnesses testifying as to whether any of the victims may have entered the country illegally and consequent attorney arguments about what the true significance of that fact is. All things considered, we cannot say the court abused its discretion under Evidence Code section 352 in precluding questioning on that particular issue.

We likewise find no violation of appellant's confrontation rights. The confrontation clause guarantees the defendant in a criminal prosecution the right of cross-examination, which includes the right to explore the bias and credibility of witnesses. (*Davis v. Alaska* (1974) 415 U.S. 308, 316; *People v. Brown* (2003) 31 Cal.4th 518, 545.) Nonetheless, the exclusion of impeachment evidence "which has only slight probative value on the issue of veracity does not infringe on the defendant's right of confrontation." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 350.)

As explained above, the issue of the victims' immigration status was not likely to have a tremendous bearing on their credibility. Moreover, the record shows appellant had ample opportunity to impeach the victims' credibility without getting into that issue. It does not appear that the jury would have formed a significantly different impression of the victims had the defense been permitted to question them about their immigration status. Therefore, the court's decision to preclude questioning in this area did not violate appellant's right of confrontation.

VII

In his final argument, appellant accuses the trial court of applying the wrong legal standard in denying his motion for a new trial. While we agree the court's statement of decision was susceptible of this charge, we believe the court properly discharged its duty in ruling on appellant's motion.

After hearing argument from counsel on the motion, the court stated, "I think it is my responsibility, . . . sitting as a, quote, '13th juror,' to make an independent review of the evidence that was presented at the trial and determine that there was

sufficient credible evidence to support the verdicts of the jurors recognizing that credibility is specifically a responsibility reserved to the jurors to make a determination with regards to a witness. [¶] [¶] . . . It's for this court to just determine that there were sufficient facts or evidence presented from which a jury could determine that witnesses were credible such that . . . substantial evidence exists to support the verdicts of the jurors in this case. I definitely will state that it is not a question of whether this court would have voted guilty or would not have voted guilty on a particular case, that's not the role of the court, but to give an independent assessment as to whether or there is sufficient credible evidence to support the verdict."

The law is clear: "On a motion for a new trial, a trial court must review the evidence independently, considering the proper weight to be afforded to the evidence and then deciding whether there is sufficient credible evidence to support the verdict. [Citation.] 'A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion. [Citation.]' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 364.) Moreover, there is a strong presumption the trial court properly exercised its discretion in granting or denying the motion. (*People v. Davis* (1995) 10 Cal.4th 463, 523.)

Although the court must undertake an independent review of the trial evidence, that does not mean, as appellant suggests, it must disregard the jury's verdict altogether or decide what result it would have reached if the case had been tried without a jury. (*People v. Robarge* (1953) 41 Cal.2d 628, 633.) Rather, the court must determine whether the jury intelligently and justly performed its role as the trier of fact. (*Ibid.*) In fulfilling this duty, the court "should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict." (*People v. Davis*, *supra*, 10 Cal.4th at p. 524.) The court should also be aware that there is a

presumption in favor of the correctness of the verdict and the proceedings that support it. (*Ibid*.)

Moreover, as a reviewing court, we must be careful not to read too much into the trial court's statements regarding the jury's role as the trier of fact. Mere recognition of this role by the court does not necessarily mean it failed to exercise its independent discretion in reviewing the evidence that was presented during the trial. (See *People v. Davis, supra*, 10 Cal.4th at p. 523.) In fact, statements expressing deference to the jury's credibility determinations will usually not suffice to invalidate a trial court's ruling on a motion for a new trial, unless the court expresses a belief it is bound by those determinations. (*Ibid*.; *People v. Robarge, supra*, 41 Cal.2d at p. 634.)

In this case, the trial court never expressed such a belief. Instead, it offered what were clearly its own independent conclusions about the evidence that was adduced at trial. For example, in discussing the attempted murder charges, the court found "it was clearly a premeditated choice" when appellant and his companions mounted an armed attack against the victims. And in discussing the qualifications of the prosecution's accident reconstruction expert, the judge observed there was nothing in the record to show the expert's "testimony would be insufficient to establish the cause of the accident." The court also commented on the victims' testimony and the circumstances of the accident before ruling on appellant's motion. Therefore, we find the court properly exercised its discretion denying appellant's motion for a new trial. No cause for reversal has been shown.

VIII

We now turn to the Attorney General's sentencing claim, which is that the trial court erred in suspending appellant's sentence on the murder count. The Attorney General has failed to persuade us the court erred in this regard.

In sentencing appellant, the trial court tried to arrive at a sentence that was commensurate with his culpability. While it believed that imposing the prescribed term

of 15 years to life for second degree murder would be too harsh, it also felt that granting probation as to all the counts would be too lenient. It therefore suspended sentenced on the murder count and sentenced appellant to concurrent seven-year terms on the attempted murder counts. The court stayed or imposed concurrent sentence on the remaining counts.

Penal Code section 190, subdivision (a) provides that, except in situations not applicable here, "every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life." Relying on the plain terms of this provision, as well as *People v. Jenkins* (1995) 10 Cal.4th 234, the Attorney General claims the court lacked the authority to suspend appellant's sentence for murder. However, *Jenkins* involved the interplay between Penal Code section 190 and Penal Code section 667.7, a sentencing scheme for habitual violent offenders. The case does not address the trial court's authority to suspend a sentence generally or under Penal Code section 190 in particular.

The Penal Code does prohibit the trial court from suspending execution or imposition of sentence in some cases. For example, courts are not allowed to suspend sentence for the crime of murder or attempted murder when the defendant personally uses a firearm during the offense. (Pen. Code, § 1203.06, subd. (a)(1)(A); see also *People v. Hames* (1985) 172 Cal.App.3d 1238 [statutes at issue prohibited suspension of sentence except in limited circumstances].) However, the Attorney General has failed to point to any sentencing provision that would preclude the court from suspending appellant's murder sentence in this case. Our analysis is therefore guided by general sentencing principles.

It is well established that trial courts generally lack authority to suspend all or part of a defendant's sentence, except as an incident to granting probation. (*In re Dupper* (1976) 57 Cal.App.3d 118, 122.) But "'when a court after pronouncing judgment and sentence of imprisonment orders part . . . of the sentence to be suspended, such order

is deemed to be an "informal" but effective grant of probation.'" (*Ibid*., citing *Oster v. Municipal Court* (1955) 45 Cal.2d 134, 139.) In that situation, the court will be deemed to have imposed sentence on the defendant on the subject count and then summarily granted him probation on the condition that he serve his sentence on the remaining counts. (*Ibid*., citing *People v. Victor* (1965) 62 Cal.2d 280, 287.)

Since that is clearly what the trial court intended to do here, we will treat its decision to suspend the murder sentence as a grant of probation conditioned on appellant's serving his seven-year term on the remaining counts. (*People v. Bueno* (1960) 177 Cal.App.2d 235, 241.) There is no basis for disturbing the court's ruling in this regard.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.